

**ORIGINAL**

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Amendment of the Commission's Rules )  
Regarding Installment Payment )  
Financing for Personal Communications )  
Services (PCS) Licensees )  
\_\_\_\_\_ )

WT Docket No. 97-82

**RECEIVED**

JAN 14 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYREPLY

Pursuant to Section 1.429 of the Commission's Rules (47 C.F.R. § 1.429), Hyundai Electronics America ("HEA"), by its undersigned attorneys, hereby responds to the parties opposing the petitions for reconsideration of the rules and policies adopted in the Second Report and Order, FCC 97-342 (released Oct. 16, 1997) ("Order"). HEA is an interested party in this proceeding because it provided financing to General Wireless, Inc. ("GWI"), the ultimate parent of 14 C-block PCS licensees that subsequently filed Chapter 11 bankruptcy proceedings. Both HEA and GWI filed petitions for reconsideration of the Order.

The three dozen petitions for reconsideration filed against the Order made clear that the Commission failed to provide an adequate response to the financial difficulties experienced by many C-block licensees. Indeed, as HEA and others pointed out, the Commission simply did not address sufficiently the issues at the heart of this proceeding, i.e., post-auction developments which resulted in withdrawal of financial opportunities for PCS operators. The parties opposing the petitions ask the Commission to continue to ignore the events which prompted

No. of Copies rec'd  
List A B C D E

0211

this proceeding and reasonable responses to those events recommended by the petitioners.<sup>1</sup> The rationales offered for this opposition are misplaced and cannot justify denying expanded relief to C-block licensees.

**1. "The Integrity of the Auction Process" Is Not a Sufficient Basis for Denying Relief.**

A number of parties invoke the mantra of "the integrity of the auction process" as a rationale for not expanding upon the relief outlined in the Order.<sup>2</sup> However, none of these parties explains how the integrity of the auction process would be undermined by granting relief based on events which occurred after the auction was complete. This argument appears to be nothing more than a euphemistic request for the Commission to punish high bidders in the C-block auction because they allegedly abused the auction process by submitting "insincere" or "speculative" bids.<sup>3</sup>

The problem with this theory is that no party has come forward with facts

---

<sup>1</sup> Cf. ClearComm Comments, at 2 ("The predominant weight of the evidence in this proceeding, as set forth in the Order, demonstrates with poignant clarity and irresistible force that the financing crisis confronting C block licensees is genuine and pervasive.").

<sup>2</sup> See, e.g., Antigone/Devco Opp., at 3; Northcoast Comm. Opp., at 4; Omnipoint Opp., at 3-4; PrimeCo Opp., at 4; Sprint Corp. Opp., at 3.

<sup>3</sup> See Antigone/Devco Opp., at 3-4; ALLTEL Opp., at 2. Antigone and Devco complain about HEA's "abnormal audacity" in filing a petition for reconsideration, based on their assertion that HEA knew of the financial circumstances of GWI in January 1997. Antigone/Devco Opp., at 4 n.3. This is obviously no basis on which to object to HEA's Petition. Relief in this rulemaking cannot be based on whether or when individual participants knew about the potential financial difficulties facing C-block licensees after the auction had closed.

supporting wrongdoing. For example, the oppositions do not attempt to establish that the C-block high bidders submitted speculative bids up through May 1996 with the intent to request modifications to the bids in March 1997. Even if there were such evidence, this is not the appropriate proceeding in which to "punish" C-block high bidders. Evidence of insincere or speculative bidding is relevant to whether a high bidder is eligible to hold the license, not whether the Commission should provide more comprehensive relief from the installment payment financing rules and options adopted in the Order.

The fact that nine months after the bidding ceased certain parties brought to the attention of the Commission circumstances in which anticipated financing opportunities had turned out to be unavailable does not establish speculative or insincere bidding.<sup>4</sup> Accordingly, for the Commission to adopt rules based only on this "integrity of the auction process" theory rather than the facts regarding financial difficulties facing C-block licensees would be per se arbitrary and capricious.<sup>5</sup>

---

<sup>4</sup> See, e.g., Letter from Thomas Gutierrez, Esq., et al., to Michele C. Farquar, Esq., Chief, Wireless Telecommunications Bureau (Mar. 13, 1997); Letter from Leonard S. Sawicki, Director, FCC Affairs, MCI Telecommunications Corp., to Mr. William F. Caton, Secretary, Federal Communications Commission (May 1, 1997); Letter from James H. Barker and Michael S. Wroblewski, Counsel to Fortunet Communications, L.P., to Mr. William F. Caton, Secretary, Federal Communications Commission (May 9, 1997).

<sup>5</sup> See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (in adopting rules and policies, an agency must "examine the relevant data and articulate a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))); N.A.A.C.P. v. FCC, 682 F.2d 993, 998 (D.C. Cir. 1982).

**2. The Commission Must Adopt Rules Based on the Record Rather Than Applying Rules Based on Bidder Defaults.**

A number of opponents of the petitions recommend no additional relief on the ground that the Commission should adhere to its existing rules governing events of default by auction winners.<sup>6</sup> This argument too is flawed. None of the parties seeking relief in this proceeding is in default. Rather, in this proceeding, the Commission is adopting rules of general applicability to address the change in financial markets for PCS systems and its impact on installment financing plans offered to C-block licensees. Therefore, the existing penalties for events of default are inapplicable.<sup>7</sup>

**3. Any Penalty Must Be Rationally Related to the Harm Caused.**

Several petitioners recommend that the Commission offer 100% credit for funds submitted as downpayments if a C-block licensee elects certain of the new options.<sup>8</sup> Those opposing the petitions recommend adherence to the forfeitures outlined in the Order.<sup>9</sup> HEA submits that keeping any amount of downpayment funds as a penalty for electing one of the three options is arbitrary and capricious

---

<sup>6</sup> See Northcoast Comm. Opp., at 3-4; Omnipoint Corp. Opp., at 2-5; PrimeCo Opp., at 5.

<sup>7</sup> See HEA Petition for Recon., at 4-5; NextWave Telecom Petition for Recon., at 13-15.

<sup>8</sup> See, e.g., Alpine PCS Petition for Recon., at 9-10; NextWave Telecom Petition for Recon., at 10-15.

<sup>9</sup> See Omnipoint Corp. Opp. at 4; Sprint Corp. Opp. at 4-5.

unless the amount is rationally related to, and commensurate with, an identified administrative harm.

The downpayments represent 10% of the auction price and were submitted to obtain a C-block license, as required by the Commission's Rules. See 47 C.F.R. §§ 1.2107(b); 24.711(a)(2). In the Order, the Commission decided to penalize C-block licensees who select one of the three new options by imposing a forfeiture of 30% (prepayment), 50% (disaggregation) or 100% (amnesty) of the downpayment. Neither the Commission nor any party opposing the petitions has adequately explained the relation between the percentages of downpayment held for the various forfeitures and any specific harms resulting from election of these options.

Each option is designed to help C-block licensees manage their debt despite loss of public and private financing opportunities. Each option also provides a means for licensees to obtain forgiveness of debt obligations to the United States, and each option involves return of spectrum for administrative reauction. See Order, ¶¶ 38, 55, 65. Yet, the three options are associated with substantially different penalties. Of the three, the 30% penalty for the prepayment option was specifically identified as consistent with an administrative penalty of 3% of a bid currently in the Commission's rules.<sup>10</sup> See Order, ¶ 65.

The Commission left unexplained why the administrative penalty for selecting disaggregation and amnesty should be substantially greater. For disaggregation, the Commission stated that it "will retain 50% of the down

---

<sup>10</sup> See Omnipoint Opp., at 4-5.

payment consistent with the amount of spectrum being surrendered to the Commission." Order, ¶ 43. With respect to amnesty, the Commission claimed that retaining 100% of the downpayment was "consistent with our previous decisions and actions affecting C block bidders in that we have retained any payments made by these C block bidders who have failed to make their first and second down payments." Id., ¶ 55 (footnote omitted).

However, unlike this proceeding, the "decisions and actions" referenced by the Commission involved high bidders who failed to submit downpayments, and so would be in default under the Commission's Rules.<sup>11</sup> Moreover, the Commission did not merely "retain" any payments by the C-block bidders; rather, the bidders were assessed the penalty for default provided in a specific formula in the Commission's Rules.<sup>12</sup>

The result in this rulemaking proceeding cannot be squared with the Commission's own policy on penalties, which requires that penalties in auction-related proceedings must be "rationally related to the harm caused."<sup>13</sup> Therefore, in this proceeding, the Commission must first identify the "harm caused," assess a reasonable and proportionate administrative remedy for that harm, and then give

---

<sup>11</sup> See BDPCS, Inc., 12 FCC Rcd 3230 (1997); Mountain Solutions LTD, Inc., 12 FCC Rcd 5904 (1997); C.H. PCS, Inc., 11 FCC Rcd 9343 (Auc. Div. 1996).

<sup>12</sup> See BDPCS, Inc., 12 FCC Rcd 6606 (WTB 1997); C.H. PCS, Inc., 11 FCC Rcd 22430 (WTB 1996); cf. 47 C.F.R. § 24.704(a)(2) (describing penalty to be assessed on defaulting C-block high bidders).

<sup>13</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding: Second Report and Order, 9 FCC Rcd 2348, 2382 (1994); see also Fifth Report and Order, 9 FCC Rcd 5532, 5564 (1994).

all C-block licensees electing any one of the three options credit for, or a refund of, the remaining funds submitted as downpayments.

4. **Conclusion**

HEA requests that the Commission reconsider the rules and policies set forth in the Order and adopt rules and policies consistent with its discussion above and in its Petition for Reconsideration.

Respectfully submitted,

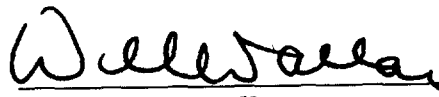
HYUNDAI ELECTRONICS AMERICA

Of Counsel:

Halfred M. Hofherr  
Senior Vice President  
General Counsel and Secretary  
HYUNDAI ELECTRONICS AMERICA  
3101 North First Street  
San Jose, CA 95134  
(408) 232-8000

Stuart H. Newberger  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 624-2500

By:

  
William D. Wallace  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 624-2500

Its Attorneys

Date: January 14, 1998

## CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 14th day of January, 1998, caused to be served true and correct copies of the foregoing "Reply" upon the following parties via hand-delivery (indicated with \*) or by United States first-class mail, postage prepaid:

The Honorable William Kennard,  
Chairman \*  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

The Honorable Harold Furchtgott-Roth \*  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

The Honorable Susan Ness \*  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

The Honorable Michael Powell \*  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

The Honorable Gloria Tristani \*  
Federal Communications Commission  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

A. Jerome Fowlkes \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 5330  
Washington, D.C. 20554

Sandra Danner \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7130-H  
Washington, D.C. 20554

David Shiffrin \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 5002  
Washington, D.C. 20554

E. Rachel Kazan \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 5002  
Washington, D.C. 20554

Daniel Phythyon \*  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 5002  
Washington, D.C. 20554

James Hedlund \*  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 845-A  
Washington, D.C. 20554

Michael Riordan \*  
Office of Plans and Policy  
Federal Communications Commission  
1919 M Street, N.W., Room 822  
Washington, D.C. 20554

David L. Nace  
B. Lynn F. Ratnavale  
Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, N.W., Suite 1200  
Washington, D.C. 20036

Gerald S. McGowan  
George L. Lyon, Jr.  
Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, N.W., Suite 1200  
Washington, D.C. 20036

Thomas Gutierrez  
Lukas, McGowan, Nace & Gutierrez  
1111 19th Street, N.W., Suite 1200  
Washington, D.C. 20036

Jay L. Birnbaum  
Jennifer Brovey  
Skadden, Arps, Slate, Meagher & Flom  
1440 New York Avenue, N.W.  
Washington, D.C. 20005

Mark J. Tauber  
Mark J. O'Connor  
Teresa S. Werner  
Piper & Marbury LLP  
1200 19th Street, N.W., 7th Floor  
Washington, D.C. 20036

James L. Winston  
Lolita D. Smith  
Rubin Winston, Diercks, Harris & Cooke  
1333 New Hampshire Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036

Michael K. Kurtis  
Kurtis & Associates, P.C.  
2000 M Street, N.W., Suite 600  
Washington, D.C. 20036

Vincent D. McBride  
2655 30th Street, Suite 203  
Santa Monica, CA 90405

John A. Prendergast  
D. Carry Mitchell  
Blooston, Mordkofsky, Jackson &  
Dickens  
2120 L Street, N.W., Suite 300  
Washington, D.C. 20037

Joe D. Edge  
Mark F. Dever  
Drinker, Biddle & Reath LLP  
901 Fifteenth Street, N.W., Suite 900  
Washington, D.C. 20005

Cheryl A. Tritt  
James A. Casey  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Michael Wack  
Michael Regan  
Charla M. Rath  
Kevin Christiano  
NextWave Telecom, Inc.  
1101 Pennsylvania Avenue, N.W.  
Suite 805  
Washington, D.C. 20004

David G. Fernald, Jr., President  
MFRI Inc.  
110 Washington Street East  
Stroudsburg, PA 18301

Charles C. Curtis, President  
OnQue Communications, Inc.  
817 N.E. 63rd Street  
Oklahoma City, OK 73105

Julia F. Kogan, Esq.  
Americal International, LLC  
1617 Nineteenth Street, N.W.  
Washington, D.C. 20009

Tyrone Brown, Esq.  
ClearComm, L.P.  
1750 K Street, N.W., 8th Floor  
Washington, D.C. 20006

Janet S. Britton  
Meretel Communications, L.P.  
913 S. Burnside Avenue  
Gonzales, LA 70737

Michael Tricarichi, President  
Cellnet Cellular Service  
23632 Mercantile Road  
Beachwood, OH 44122

Lonnie Benson, CEO  
Fox Communications Corp.  
13400 N.E. 20th, Suite 28  
Bellevue, WA 98005

Oue Obe, CEO  
Wireless Nation, Inc.  
230 Pelham Road, Suite 5L  
New Rochelle, NY 10805

Charles W. Christensen, President  
Christensen Engineering & Surveying  
7888 Silverton Avenue, Suite J  
San Diego, CA 92126

Thomas E. Repke, President  
One Stop Wireless of America, Inc.  
2302 Martin Street, Suite 100  
Irvine, CA 92512

John M. O'Brien, CEO  
Federal Network  
639 Kettner Boulevard  
San Diego, CA 92101

Kevin S. Hamilton, CEO  
Prime Matrix Wireless Communications  
26635 West Agoura Road  
Calabasas, CA 91302

James W. Smith, Vice President  
Koll Telecommunication Services  
27401 Los Altos, Suite 220  
Mission Viejo, CA 92691

Vincent E. Leifer, President  
Leifer-Marter Architects  
2020 Chapala Street  
Santa Barbara, CA 93105

Monuj Bose  
New Wave, Inc.  
130 Shore Road, Suite 139  
Port Washington, NY 11050

Phillip Van Miller, Chairman & CEO  
United Calling Network, Inc.  
27069 La Paz Road, Suite 403  
Laguna Hills, CA 92656

Marc A. Marzullo, P.E.  
URS Greiner, Inc.  
2020 K Street, N.W., Suite 310  
Washington, D.C. 20006

Glenn S. Rabin  
Federal Regulatory Counsel  
ALLTEL Services Corporation, Inc.  
655 15th Street, N.W., Suite 220  
Washington, D.C. 20005

Jay C. Keithley  
Rikke K. Davis  
Sprint Corporation  
1850 M Street, N.W., Suite 1100  
Washington, D.C. 20036

William L. Roughton, Jr.  
Associate General Counsel  
PrimeCo Personal Communications, L.P.  
601 13th Street, N.W., Suite 320 South  
Washington, D.C. 20005

John M. Dolan  
Northcoast Communications, LLC  
6800 Jericho Turnpike, Suite 120 West  
Syosset, NY 11791

David J. Kaufman  
Scott C. Cinnamon  
Eugene J. Huh  
Brown Nietert & Kaufman, Chartered  
1920 N Street, N.W., Suite 660  
Washington, D.C. 20036

Laura L. Johnson  
President and CEO  
Polycell Communications Inc.  
27W281 Geneva Road, Suite K-2  
Winfield, IL 60190-2035

Richard L. Vega, Sr.  
President  
Duluth PCS, Inc.  
St. Joseph PCS, Inc.  
West Virginia PCS, Inc.  
1245 W. Fairbanks Avenue, Suite 380  
Winter Park, FL 32789-4878

The following parties were not served,  
because there was no address information available:

RFW PCS, Inc.

Dorne & Margolin

Douglas V. Fougnes, CEO  
Cellesix International

Wendimarie Haven, President  
Airtel Communications, Inc.

Vincent Caputo  
CVI Wireless

  
William D. Wallace